IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-738

JOETHELIA PALMER,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, JOSEPH P. HANNON, RAYMOND C. PRINCIPE, GERARD J. HEING, BESSIE F. LAWRENCE, NINA F. JONES, JAMES G. MOFFAT, and FLORENCE H. PASKIND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Justices of the Supreme Court of the United States:

Petitioner, Joethelia Palmer, respectfully prays that a Writ of Certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit, affirming the summary judgment granted to Defendants by the United States District Court for the Northern District of Illinois, Eastern Division.

The Petitioner, a nontenured certified elementary teacher in the school system of the Board of Education was discharged

by the Board of Education, without notice or hearing of any kind. The reasons assigned for this dismissal were that Petitioner, on the basis of her religious principles, had refused to teach the words of the Pledge of Allegiance to the Flag and to various patriotic songs to her kindergarten pupils.

Plaintiff filed a Motion for Temporary Restraining Order seeking to overturn her dismissal. Defendants simultaneously filed a Motion for Summary Judgment. The District Court denied Plaintiff's motion and granted the motion of Defendants. In so doing it held that Plaintiff's religious rights were subordinate to the State's interest in compelling the teaching of its curriculum. He further held that since the Plaintiff did not hold tenure and since no liberty interest had been infringed, she was not entitled to a hearing prior to her dismissal.

The United States Court of Appeals for the Seventh Circuit affirmed.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois Eastern Division, was rendered on January 31, 1979, and is reported at 466 F. Supp. 600 (1979). The opinion is reproduced as Appendix "A" to this Petition. The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on August 14, 1979. It is not yet reported. That opinion is reproduced as Appendix "B" to this Petition.

JURISDICTION.

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on August 14, 1979. No Petition for rehearing was filed. The jurisdiction of this Court rests on 28 U. S. C., § 1254(1).

QUESTIONS PRESENTED.

1. Whether a public school teacher has the right to decline to participate in teaching the pledge of allegiance to the flag

and the singing of certain partriotic songs and the celebration of certain holidays when to do so will violate her religious beliefs protected under the First Amendment to the United States Constitution.

2. Whether the due process clause of the Fourteenth Amendment to the United States Constitution requires a public employer to grant an employee notice and a hearing before dismissing such employee on the basis of reasons involving religious beliefs protected by the First Amendment to the United States Constitution.

STATEMENT OF FACTS.

Petitioner, Joethelia Palmer, was appointed as a regularly certificated full-time teacher in the Chicago Public School System in September, 1976, assigned to teach the kindergarten class at Field Elementary School. Prior to the commencement of classes, she informed the principal, Florence Paskind, that she had recently become a member of the Jehovah's Witness Religion. She stated that due to her religious beliefs and the beliefs of the religion to which she belonged, that she would not be able to teach any subjects having to do with love of country, the flag and other patriotic matters.

Ms. Paskind, being unsure as to the actions she should take, sought counsel from her superiors. No response of any kind was forthcoming until August, 1977. On September 15, 1977 Ms. Paskind, Gerald Heing, the District Superintendent, and other officials of the Board met to discuss the situation. As a result of that meeting, Ms. Paskind was directed to write a letter to Plaintiff.

Ms. Paskind handed a letter to Petitioner in September, 1977, which contained the following directives among others:

A. Teach the pledge of allegiance to the flag of the United States.

B. Teach the words and music of "America."

C. Teach the words and music of "other appropriate and patriotic songs."

D. Teach, direct and conduct, "activities preparatory to a variety of holidays commonly observed so children will learn ethos of all people and develop tolerance and appreciation."

Petitioner responded in writing to this letter stating that she could not comply with these directives, although she would put forth extra effort to comply with the other directives contained therein. She also informed the principal that she would make every effort to cooperate in these other matters. In fact, Petitioner did attempt to comply with these other directives and was performing in an acceptable manner.

On December 21, 1977, Petitioner received a letter from Joseph Hannon, the General Superintendent of Schools, informing her that her employment would be terminated as of December 23, 1977. This letter stated in part as follows:

"2. During the period from September, 1976, to the present Ms. Palmer refused to participate in the salute to the flag and patriotic assembly and to teach the words of the National Anthem. Based on religious motives, she refused to conduct activities in preparation for a variety of holidays."

"3. On Septmber 15, 1977, Ms. Palmer was directed in writing by the principal of Field Elementary School to teach all the required curriculum prescribed for kindergarten by the Chicago Board of Education and in accordance with the school code of the State of Illinois."

"4. On October 2, 1977, Ms. Palmer repudiated said direct written order by indicating that she would not comply with any curriculum requirements. This action constituted deliberate non-conformity with curriculum as required by the Chicago Public School System."

"5. All system-wide possibilities for the placement of Ms. Palmer have been reviewed, and there is no position system-wide under her certificate where she could be accomodated."

The principal had not recommended that this action be taken. She did not agree with the statement in the letter that Petitioner would not comply with any curriculum requirements. She also felt that this notification did not accurately portray the situation.

The decision to terminate the Petitioner's employment originated in either the Department of Teacher Personnel or the Law Department of the Board of Education, the personnel of neither of which had first-hand knowledge of any of the facts of the matter.

The only person who ever discussed these matters with Petitioner was Ms. Paskind. The decision to terminate was based solely upon the hearsay information provided by the principal. At no time was Plaintiff given a hearing or any opportunity to be heard.

Respondents have been unable to identify any specific rule, regulation or statute which has been violated by Petitioner. The only curricula to which they have referred are general statements of philosophy which contain headings such as the following:

"Education serves all people in a democracy"
"Education develops high democratic ideals"
"Education aims at self-direction"
"The social group effects the learning process"
"Practicing American citizenship"
"Satisfying spiritual and aesthetic needs"

The evidence in this case shows that, in effect, the curriculum in each individual school is what that particular principal decides it should be. In the view of the principal here, the pledge to the flag and the singing of "America" was practiced for the purpose of establishing routines for the child in order to help a development of social relationships.

The District Court denied Petitioner's Motion for Temporary Injunction and granted Respondents' Motion for Summary Judgment based upon the motions of the parties, memoranda of law, depositions and other discovery materials. No hearing was

held on the Motion. The District Court set forth the proposition that there is a distinction between the freedom to believe in religious tenets and the freedom to practice those beliefs. While recognizing that Petitioner's freedom of religion is fundamental, the District Court purported to balance that interest against what it found to be a compelling interest on the part of the Board in regulating its curriculum in the primary grades. The Court held that Petitioner's refusal to teach certain patriotic songs and conduct activities for holidays such as Lincoln's Birthday, Columbus Day, Halloween and birthdays of individual children, and the like was curricular non-conformity not protected by the Constitution. It held that Petitioner's refusal to follow this "curriculum" was valid reason for her dismissal.

The District Court dismissed Petitioner's due process claim in a footnote, holding that she was not entitled to a hearing of any kind since she was non-tenured and was not discharged for exercise of any liberty interest protected by the Constitution.

The Court of Appeals for the Seventh Circuit affirmed. Despite the fact that Respondents could point to no specific curriculum or policy which contained any directions to Petitioner to teach those subjects about which Respondents complained, the Court of Appeals held that the letter from the principal to Petitioner was sufficient to constitute such a valid policy statement. The Court went on to say that there was nothing innovative or unique in this regard. The Appellate Court held that "it is traditional. There was no misunderstanding about what was expected to be taught."

The Court held that the refusal of Petitioner to teach these specific matters was proper reason for her discharge.

The Court of Appeals further held that Petitioner's rights to due process had not been denied because she was asserting no constitutionally protected interest and had suffered no stigma by reason of her discharge.

REASONS FOR GRANTING THE WRIT.

I.

Petitioner Has Been Discharged from Her Public Employment in Violation of the First Amendment.

The decision of the Court below in this case is at odds with the holdings in this Court, as well as the holdings of other Courts on the same issue. The Courts below both held that Plaintiff's First Amendment Right to religious freedom and freedom of thought had been overbalanced by the alleged right of the Board of Education who control its curriculum. This holding flies in the face of this Court's finding in *Wisconsin* v. *Yoder,* 406 U. S. 205, 215, 92 S. Ct. 1526 (1972), that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." The Courts below ignored the clear enunciation by this Court that students and teachers do not shed their First Amendment rights at the schoolhouse door. *Tinker* v. *DesMoines Independent Community School District,* 293 U. S. 503, 89 S. Ct. 733 (1969).

This Court has observed that "it is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of Constitutional guarantees. *Keyishian* v. *Board of Regents,* 385 U. S. 589, 605-06, 87 S. Ct. 675, 684-85, 17 L. Ed. 2d 629 (1967). The First Amendment secures the right to both advocate religious, political and ideological causes and also guarantees an equal right to decline to foster such concepts. "The right to speak and the right to refrain from speaking are complimentary components of the broader concept of 'individual freedom of mind.'" *Wooley* v. *Maynard,* 430 U. S. 705, 97 S. Ct. 1428, 1435 (1977). This protection prohibits a state from excluding a person from his chosen profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. When a State seeks to inquire

about individual belief and association, a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate State interest. *Baird* v. *State Bar of Arizona,* 401 U. S. 1, 7, 91 S. Ct. 702, 706 (1971).

The free exercise of religion clause categorically forbids the Government from regulating, prohibiting or rewarding religious beliefs as such and depriving persons of rights and privileges available to others on the sole basis of their religious beliefs. *McDaniel* v. *Paty,* ..... U. S. ....., 98 S. Ct. 1322 (1978). The decision of the Court of Appeals is based upon the view that it is proper cause to dismiss a teacher for the failure or refusal to teach any part of the curriculum which the Board of Education may have mandated. The Court butresses its decision by the alleged finding that Petitioner "would deprive her students of an elementary knowledge and appreciation of our national heritage." The fact that there was no curriculum requirement anywhere mandating the teaching of the words to the song "America" and the words of the Pledge of Allegiance is brushed aside with the statement that there was "nothing innovative or unique in this phase of the curriculum. It is traditional."

In order to buttress its holding, Court of Appeals completely distorts Petitioner's position herein. The Court states that Petitioner considered it to be promoting idolatry to teach "about President Lincoln and about why we observed his birthday. However, it would apparently not offend her religious views to teach about some of our past leaders lest proudly regarded." This is not and never has been Petitioner's position. Her objection is not to teaching about President Lincoln or others whose birthdays may be celebrated by holidays. Her only objection is to observing the holiday itself. She has absolutely no objection to teaching about the individual himself, his importance and place in our history.

The essence of the decision of the Court of Appeals is that one who breaks with tradition does so upon pain of loss of job, regardless of the motivation. It is just such a view which this

Court has repeatedly rejected. The Court of Appeals relies upon this Court's decision in *Epperson* v. *Arkansas,* 393 U. S. 97, 89 S. Ct. 266 (1968) for the proposition that the States possess a right to prescribe the curriculum for their public schools. In doing so, it misconstrues the import of this Court's decision which is that while the States generally have such a right, it "does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment." *Id.* at 107, 89 S. Ct. at 272.

This case presents the opposite side of that coin. The State does not have the right to require a teacher to advocate that which he or she cannot do in good conscience. The fact that the dispute is regarding matters of political beliefs does not lend weight to the argument of the Board of Education. As this Court said in squarely holding that students may not be required to participate in the pledge to the flag:

> "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of substance is the right to differ as to things that touch the heart of the existing order. . . ."
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other methods of opinion, or for citizens to confess by word or act their faith therein."

West Virginia State Board of Education v. *Barnette,* 319 U. S. 624, 63 S. Ct. 1178 (1943).

Contrary to the holding of the Court of Appeals, Petitioner has not refused to teach anything regarding our historical heritage. She has merely refused to participate in various formal trappings which the majority has found to be traditionally recognized indicia of our political beliefs. Petitioner has never refused to instruct and guide her students in these matters. Rather, she has merely refused to teach the Pledge, to sing patriotic songs,

and to participate in certain holiday activities, based upon her honest and sincerely held belief that to do so is to worship idols in violation of the biblical injunction not to worship graven, man-made images. Exodus 20: 4, 5. She has done no more than to indicate that symbols are no replacement for the teaching of the basic underlying concepts of our form of government. Ironically, the Board of Education and the Courts below would demonstrate our freedoms to Petitioner's students by depriving Petitioner of those very rights.

Every decision of this Court and other Courts which have faced this issue are contrary to the decision by the Courts below in this case. In *Russo* v. *Central School District No. 1*, 469 F. 2d 623 (2nd Cir. 1973), where held that the dismissal of a teacher who refused to participate in the pledge to the flag was constitutionally impermissible, the Court said:

> "There is little room in what Mr. Justice Jackson once called the 'majestic generalities of the Bill of Rights' . . . for an interpretation of the First Amendment that would be more restrictive with respect to teachers than it is with respect to their students where there has been no interference with the requirement of appropriate discipline in the operation of the school."

It was specifically recognized there that the right to freedom of speech includes the right to remain silent.

Similarly, in *Opinions of the Justices to the Governor*, 362 N. E. 2d 251 (Mass. 1977), the Massachusetts Supreme Court held that the freedom to remain silent "is susceptible of restriction only to prevent grave and immediate danger to an interest which the State may lawfully protect." The Court there held that teachers could not be compelled to participate in the pledge to the flag upon penalty of possible dismissal. See also *State* v. *Lundquist*, 262 Md. 534, 278 A. 2d 263 (1971).

Again, in *Hanover* v. *Northrup*, 325 F. Supp. 170 (D. Conn. 1970), the Plaintiff refused to either lead or recite the pledge to the flag and arranged for a student to lead the class while she

remain seated at her desk with her head bowed. Ordering reinstatement of this teacher who was dismissed by the Board of Education, the Court held that this was a constitutionally impermissible reason for discharge. It further held that in order for a teacher to be discharged for such reasons, there must be demonstrated a real and present threat to the maintenance of discipline and fear of disorder which would work serious harm to the school system.

There is nothing in the record in this case which would indicate that there has been any threat to the maintenance of discipline or any fear of disorder of any kind. The record is to the contrary. The Board here even refused to transfer Petitioner to another class on the ground that wherever she taught her views on this subject would make her performance unsatisfactory. Neither the Board of Education nor the Courts below have been able to show any danger to Petitioner's students. Rather, they have punished Petitioner for holding beliefs which are not the same as theirs. Petitioner has been shown guilty of nothing other than being different. Our Constitution does not allow such an attitude. Such a decision, if allowed to stand, will have the unalterable effect of chilling the exercise of our most precious right—freedom of belief. Our Constitution will not allow such an insistence upon orthodoxy. See *Laird* v. *Tatum*, 408 U. S. 1, 12, 92 S. Ct. 2318, 2324 (1973).

II.

Petitioner Has Been Denied Due Process of Law.

Both Courts below held that Petitioner was entitled to no due process rights because, in the words of the Court of Appeals, her "religious freedom is not being extinguished."

This statement merely underlines the inability of the Court below to comprehend the rights at issue here. As is demonstrated above, Petitioner's rights to exercise her religious beliefs may be outweighed only by the showing of a countervailing State interest

of overriding significance. *Wisconsin* v. *Yoder*, 406 U. S. 205, 215, 92 S. Ct. 1526 (1972). The Court of Appeals has not explained how it has come to the conclusion that Petitioner's religious freedom is not being extinguished. She has been penalized for the exercise of her religious beliefs. To argue that no religious right or other right under the First Amendment has been infringed is to deny the consistent decisions of this Court.

In *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 92 S. Ct. 2701 (1972), this Court held that whenever protected interests are implicated "the right to some kind of *prior hearing* is paramount." *Id.* at 570-71, 92 S. Ct. at 2705 (emphasis added). This Court there declared that liberty is a broad and majestic terms, and re-emphasized that the Constitution has been repeatedly construed to require "due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process." In discussing the matters contained within the definition of liberty this Court there clearly included the right of an individual "to worship God according to the dictates of his own conscience." *Id.* at 573, 92 S. Ct. at 2706-07.

To deny that this case involves a liberty right protected by the due process clause of the Fourteenth Amendment is to deny the very existence of the First Amendment. As was said in *School District of Abington* v. *Schempp*, 374 U. S. 203, 222, 83 S. Ct. 1560, 1571 (1963), the free exercise of religion clause "recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the State."

This case presents a situation where both substantive and procedural due process coalesce. Not only was the action by the Board in dismissing Plaintiff taken without the appropriate procedural protections required by the Constitution, it was taken in violation of substantive due process guarantees. The situation here is akin to that discussed in *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790 (1963), where it held that a State could not deny unemployment compensation benefits to an individual who refused employment requiring her work on a Saturday, due to her religious beliefs. The Court observed that such a denial of benefits forces the individual

> "to choose between following the precepts of her religion and forefeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday workship."

This is exactly the situation in which this Petitioner finds herself. Her employment in her chosen profession is being conditioned upon the requirement that she abandon the precept of her religion that she not worship idols or graven images.

The ruling below amounts to an irrebutable presumption that to fail to teach the pledge to the flag and the words of various patriotic songs *ipso facto* makes one an incompetent or unsavory teacher. Such irrebutable presumptions were declared forbidden by this Court in *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 94 S. Ct. 791 (1974). The Court there decreed that the due process clause requires "a more individualized determination" than a blanket conclusion supported by no specific factual underpining. The presumption here that one who fails to teach certain patriotic exercises must be incapable of teaching in the elementary grades of the public schools is no more viable than the presumption overturned in *LaFleur* that a teacher must be incapable of teaching beyond her sixth month of pregnancy.

Thus, both the reason for the discharge of Petitioner and the manner in which it was summarily carried out are repugnant to the most basic of our Constitutional guarantees. To allow the decisions of the Courts below to stand will constitute a serious deviation from the unswerving commitment of this Court to the protection of religious freedom guaranteed by the First and Fourteenth Amendments.

CONCLUSION.

Petitioner is being deprived of her employment because she is different. Respondents and the Courts below have penalized her because her beliefs differ from theirs. Our Constitution clearly prohibits the imposition of such a penalty.

The decisions below deprive Petitioner of those rights which all recognize are guaranteed to her students. This Court should take this case to once again demonstrate that our Constitution, both procedurally and substantively protects unorthodoxy.

The Court should grant this Petition and issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit to again emphasize that there is no violation of freedom of religion which is too unimportant to stand unredressed. In this most sensitive area, any infringement of that right, no matter how small, cannot be tolerated.

Respectfully submitted,

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APPENDIX "A".

Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, January 31, 1979.

MEMORANDUM OPINION

FLAUM, *District Judge*:

The instant case for injunctive relief presents sensitive first amendment questions concerning a school board's proposed discharge of a teacher because of her refusal, based on religious belief, to instruct her students in the Pledge of Allegiance, to lead them in certain patriotic songs and to conduct instruction and activities concerning certain national holidays. Plaintiff brings this action pursuant to 42 U. S. C. § 1983 and its jurisdictional counterpart, 28 U. S. C. § 1343(3). The cause is before the court on her motion for a preliminary injunction. Fed. R. Civ. P. 65. Defendants move for summary judgment. Fed. R. Civ. P. 56. For the reasons stated below, plaintiff's motion is denied. Defendants' motion is granted and judgment is entered in their behalf.

The facts are not in dispute. Plaintiff, a Jehovah's Witness, was appointed in September, 1976 as a full-time non-tenured teacher by defendant Board of Education. She teaches a kindergarten class in the Field School. Prior to commencement of the 1976-77 school year, plaintiff visited defendant Florence Paskind, the school's principal, to inform her that due to her sincerely held religious convictions she would not teach "anything having to do with love of country, the flag and other patriotic matters." (Paskind dep., p. 8). In deference to these convictions, Paskind met with plaintiff and instituted certain procedures to accommodate her. During the course of that school year, Paskind permitted a "team teacher," a student teacher and, in cer-

tain instances, parent volunteers to instruct the children on matters of patriotism.[1] For various reasons, all of these methods proved infeasible.

During this period, plaintiff refused to lead activities related to holidays like Columbus Day, Halloween, Thanksgiving and Christmas.[2] At times, when no other aid was available, she allowed her five-year-old students to recited the pledge on their own. According to Paskind, the results of such a practice were "chaotic." (Paskind dep., p. 69). Plaintiff's teaching behavior failed in other respects. She overemphasized or ignored certain areas, failed to use toys provided and failed to prepare adequate lesson plans and was otherwise disorganized. During the school year, Paskind received complaints from parents concerning the fact that their children were not receiving the same instruction that other classes had received and that if she were to remain, they would hesitate to enroll their children in kindergarten there.

At the commencement of her second year teaching in September, 1977 plaintiff received a letter from Paskind directing her to do the following:

1) Teach and direct, with proper diction and understanding, the Pledge of Allegiance to the flag of the United States.
2) Teach and direct the proper words and music of "America."
3) Teach and direct the proper words and music of other appropriate patriotic songs as well as other songs customarily taught to kindergarten children.

1. Paskind rejected using older students at the school as being burdensome on them. She also noted in her deposition that the Pledge of Allegiance is broadcast daily at 9:00 A.M. This second alternative was rejected because Paskind felt that children at kindergarten level need actual guidance in order to properly learn the pledge.

2. The holidays also included birthdays and "worshipful honors to the memory of prominent men." (Pl. letter to defendants dated Oct. 2, 1977). The holiday activities included story telling, play acting, singing and classroom decorating. According to Paskind, holiday activities were held on a weekly and sometimes daily basis.

4) Teach and direct proper rhythms, dances and body movements to develop large motor skills.
5) Teach, direct and conduct activities preparatory to a variety of holidays commonly observed so children learn the ethos of all people and develop tolerance and appreciation.
6) Teach and direct play activities which develop social and personal interrelationships.
7) Teach children, by direction and example, to express skills of appreciation and gratitude.

The letter further stated that plaintiff had the right to express her own views "in a moderate way within the purview of a given course of study and in keeping with the maturity level of the children being taught."

By an October 2, 1977 letter, plaintiff responded that due to her religious principles she would not comply with directives 1, 2, 3 and 5. Specifically, she stated compliance would "damage my spiritual relationship with God, Jehovah [and] that [it] would damage my conscience serving Him." She stated that since the Bible proscribes her bowing down to any idol and that in her view the flag represented such an idol, she could not comply with the directive. She further stated that since she believed in the coming of God's government over mankind, she would not, as a Jehovah's Witness, commit herself patriotically to any existing government. She cited various biblical passages in support of her refusal to conduct holiday activities. Plaintiff pledged she would put forth extra effort in comply with directives 4, 6 and 7.

On December 21, 1977 plaintiff was served with notice from defendant Hannon that inasmuch as she had not complied with the required curriculum, her service as a probationary teacher would be terminated on December 23. The letter said that all possibilities for alternative placement had been reviewed and there was no other position available in which she could be

accommodated.[3] Defendants never conducted any hearing prior to the discharge determination. Defendants have deferred taking action pending outcome of this suit.

A number of consequences have resulted from plaintiff's refusal to teach these matters. First grade teachers at the Field School had to instruct the children on subject matter they should have been taught by their kindergarten teacher. Parents and children have been upset. In one instance a child was reduced to tears because plaintiff refused to accept a Valentine's Day gift. (Paskind dep., p. 72). The cognitive area of instruction was unduly emphasized to the detriment of the children's affective or emotional development.

In considering the merits of this suit, the court must necessarily distinguish between the freedom to believe in certain religious tenets and the freedom to act. As has been noted, the Supreme Court "has consistently held that the religious freedom guarantee embraces 'freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' " *Biklen* v. *Board of Education,* 333 F. Supp. 902, 909 (N. D. N. Y. 1971), *aff'd,* 406 U. S. 951, 92 S. Ct. 2060, 32 L. Ed. 2d 340 (1972), *citing Cantwell* v. *Connecticut,* 310 U. S. 296, 303-04, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). Further, the court recognizes the defendant school board has an "undoubted right" to regulate its curriculum. *Epperson* v. *Arkansas,* 393 U. S. 97, 107, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968). States acting through local school boards are possessed of power "to inculcate basic community values in students who may not be mature enough to deal with academic freedom as understood or practiced at higher educational levels." *East Hartford Education Assn.* v. *Board of Education,* 562 F. 2d 838, 843 (2d Cir. 1977). Defendants are adjured by statute to

3. Paskind testified at her deposition that plaintiff at first refused to be considered for any other teaching position but kindergarten teacher, but that she later said she would work in any grade from kindergarten to third (p. 34).

insure plaintiff teaches matters of patriotism. Ill. Rev. Stat. ch. 122, §§ 27-3, 27-12 (1975).

Plaintiff's freedom of religion is a fundamental one and can be infringed only by the existence of a compelling state interest. Consequently, the court must balance the state's interest against plaintiff's right to be free from intrusion into her religiously motivated activities. "That the state has a compelling interest in assuring the fitness and dedication of its teachers is a self-evident proposition." *Biklen* v. *Board of Education,* 333 F. Supp. at 909. It follows that the regulation of curriculum in the primary grades is likewise compelling. In *Biklen,* a teacher, a Quaker, was discharged for her refusal to take an oath or make an affirmation that she would support the state and federal constitution and that she would perform her duties to the best of her abilities. On religious grounds, she declined. There as here

> plaintiff's beliefs are sacrosanct—she is not being denied a teaching position in the public schools *qua* Quaker, orthodox or not. She is being denied because she refuses to affirm her support of the Constitution of the United States and the State of New York or even that she will do her best as a teacher.

Id. at 90. The requirement in *Biklen* was far more onerous than the one required here. Plaintiff was specifically permitted to express to her students that her views did not coincide with those values taught in the Pledge of Allegiance and patriotic songs.

Citing a series of cases dealing with students' rights, plaintiff asserts that she has an absolute right not to be forced to instruct her students in the Pledge of Allegiance. In *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Supreme Court held the free exercise clause of the first amendment permitted students to refrain on the basis of their religious beliefs from participation in a legally mandated flag ceremony. This protection was extended to a variety of situations by the lower courts. *See, e. g., Goetz* v.

Ansell, 477 F. 2d 636 (2d Cir. 1973) (student not permitted to remain quietly sitting during pledge); *Frain* v. *Baron,* 307 F. Supp. 27 (E. D. N. Y. 1969) (student not permitted to remain in room during pledge). These cases are obviously distinguishable on the ground that they involve the individual rights of students where the exercise of such rights does not result in substantial disruption to the classroom.

Two cases have squarely held that a teacher can raise the shield of the first amendment in instances where he is discharged for his refusal to pledge allegiance. In *Russo* v. *Central School District No. 1,* 469 F. 2d 623 (2d Cir. 1972), *cert. denied,* 411 U. S. 932, 93 S. Ct. 1899, 36 L. Ed. 2d 391 (1973) a high school art teacher was dismissed for refusal to participate in the pledge. During the ceremony, she would stand at respectful attention while a fellow teacher assigned to the class conducted the activity. He behavior was not disruptive. Discharge on the basis of her refusal alone was held to violate her rights. The court limited its holding to the circumstances of the case: the lack of disruption; the supervision of the other teacher; her avoidance of any proselytizing; the fact that her pupils, who ranged in age from 14 to 16 years, "were not fresh out of their cradles." 469 F. 2d at 633. The court noted that if she had been a student her refusal was a form of expression that would have been protected under *Barnette.* Noting that *Tinker* v. *Des Moines Independent School Dist.,* 393 U. S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 held that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the school house gate," the court held the legitimate state concerns in maintaining flag salute programs could be furthered in a less restrictive manner and therefore the regulations in question "do not meet the test of constitutional exactness required by the First Amendment." *Russo* v. *Central School District No. 1,* 469 F. 2d at 632-633. Similarly, in *Hanover* v. *Northrup,* 325 F. Supp. 170 (D. Conn. 1970), a seventh and eighth grade teacher was discharged for her refusal to lead the

class in the pledge. The court held her refusal was a form of expression protected by the first amendment noting "there was no suggestion that Mrs. Hanover's behavior resulted in any disruption of school activities." 325 F. Supp. at 173.

Russo and *Hanover* do not apply to the facts of the instant case. Defendants have demonstrated that not only did plaintiff refuse to participate in the pledge, she also refused to teach certain patriotic songs and conduct holiday activities. Such curricular nonconformity is not protected. *See, e. g., Adams* v. *Campbell County School District,* 511 F. 2d 1242 (10th Cir. 1975); *Clark* v. *Holmes,* 474 F. 2d 928 (7th Cir. 1972), *cert. denied,* 411 U. S. 972, 93 S. Ct. 2148, 36 L. Ed. 2d 695 (1973); *Ahern* v. *Board of Education,* 456 F. 2d 399 (8th Cir. 1972); *Hibbs* v. *Board of Education,* 392 F. Supp. 1202 (N. D. Iowa 1975). Further, her refusal resulted in substantial upset to all involved: to the parents, students and other teachers. (Paskind dep., pp. 30-31). The principal was forced to obtain alternative modes of instruction. (Paskind dep., pp. 20-25, 33). The first grade teachers were forced to teach subject matter that should have been covered in kindergarten. (Paskind dep., p. 64). Parents complained. (Paskind dep., p. 30). All of the cases cited by plaintiff conditioned nonparticipation on the factor of nondisruption. The cases are distinguishable on that basis.

For the purposes of this case, the court can assume that the discharge of a teacher for her refusal to instruct her students in the pledge is a constitutional violation. Assuming her refusal to teach the pledge is protected, her refusal to participate in holiday activities and songs is not protected as the cases cited above hold in a free speech context.[4] The fact that the decision to discharge was based in "substantial part" on the protected activity does not end the court's inquiry.

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was a "substantial

4. Any alleged religious overtones to those activities are not grounds for refusing to teach them. *See Smith* v. *Denny,* 280 F. Supp. 651 (E. D. Cal. 1968).

> factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even if the absence of the protected conduct.

Mt. Healthy City Board of Education v. *Doyle,* 429 U. S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977). *See also Schmidt* v. *Freemont County School Dist. No. 25,* 558 F. 2d 982 (10th Cir. 1977); *Johnson* v. *Cain,* 430 F. Supp. 518, 521 (M. D. Ala. 1977). This determination necessarily depends on the facts of each individual case. *East Hartford Education Ass'n* v. *Board of Education,* 562 F. 2d at 843. Assuming that the refusal to lead the class in the pledge was protected and the refsual played a substantial part in defendants' decision to discharge plaintiff, the court must inquire whether the defendants could have reached the same conclusion in the absence of such conduct. Defendants clearly could have discharged plaintiff because of her refusal to follow the school curriculum requirement. As noted above, the refusal to conform classroom teaching to a prescribed curriculum is not protected. Since plaintiff conceded that she failed to follow the curriculum, this neutral ground supports the conclusion that defendants would have reached the same conclusion in the absence of the protected activity.[5]

Accordingly, Defendants' motion for summary judgment is granted and judgment is entered in their behalf. This case is hereby dismissed.

It is so ordered.

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5. Plaintiff's contention that she was deprived of due process by virtue of defendants' failure to afford her notice and a hearing prior to deciding to discharge her is without merit. Plaintiff as a non-tenured teacher has no entitlement to continued employment under state law. Board of Regents v. Roth, 408 U. S. 564 (1972). Further, as noted in the court's opinion, she was not ordered discharged for exercise of a liberty protected by the constitution. *See* Perry v. Sindermann, 408 U. S. 593 (1972).

APPENDIX "B".

Opinion of the United States Court of Appeals for the Seventh Circuit, August 14, 1979.

Before PELL, SPRECHER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* Plaintiff states the issue to be whether or not a public school teacher in her classes has the right to refuse to participate in the Pledge of Allegiance, the singing of patriotic songs, and the celebration of certain national holidays when to do so is claimed to violate her religious principles. The issue is more correctly stated to be whether or not a public school teacher is free to disregard the prescribed curriculum concerning patriotic matters when to conform to the curriculum she claims would conflict with her religious principles. Plaintiff also claims her ultimate discharge denied her due process of law.

Plaintiff, a member of the Jehovah's Witnesses religion, was a probationary kindergarten teacher in the Chicago public schools. After her appointment, but prior to the commencement of classes, plaintiff informed her principal that because of her religion she would be unable to teach any subjects having to do with love of country, the flag or other patriotic matters in the prescribed curriculum. Extraordinary efforts were made to accommodate plaintiff's religious beliefs at her particular school and elsewhere in the system, but it could not reasonably be accomplished.[1]

The trial court allowed the defendants' motion for summary judgment. As there is no substantive factual dispute, additional recitation of the factual details is not required. Plaintiff argues that the offended curriculum is so broad and vague as to be incomprehensible.

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1. Numerous faults with plaintiff's teaching were claimed by defendants, but on appeal they are not urged as justification for plaintiff's discharge.

In *Epperson* v. *Arkansas*, 393 U. S. 97, 107 (1968), the Court held invalid as offending the First Amendment an Arkansas statute prohibiting the teaching of a particular doctrine of evolution considered contrary to the religious views of most citizens. The Court recognized, however, that the states possess an undoubted right to long as not restrictive of constitutional guarantees to prescribe the curriculum for their public schools. Plaintiff would have us fashion for her an exception to that general curriculum rule. The issue is narrow.

Our decision in *Clark* v. *Holmes*, 474 F. 2d 928 (7th Cir. 1972), *cert. denied*, 411 U. S. 972 (1973), is of some guidance. In that case the complaint about a university teacher was that he ignored the prescribed course content and engaged in unauthorized student counseling. We held that the First Amendment was not a teacher license for uncontrolled expression at variance with established curricular content. The individual teacher was found to have no constitutional prerogative to override the judgment of superiors as to the proper content for the course to be taught. In *Ahern* v. *Board of Education*, 456 F. 2d 399 (8th Cir. 1972), the court upheld a teacher dismissal for insubordination on the basis that the Constitution bestowed no right on the teacher to disregard the valid dictates of her superiors by teaching politics in a course on economics. In *Adams* v. *Campbell County School District*, 511 F. 2d 1242 (10th Cir. 1975), the court stated that the Board and the principal had a right to insist that a more orthodox teaching approach be used by a teacher who was found to have no unlimited authority as to the structure and content of courses.

Plaintiff relies on a cross-section of First Amendment cases, but they are of little assistance with the specific issue in this case. Plaintiff argues that the defendants are trying to determine and limit the extent of her religious freedoms. The facts do not justify that legal perspective. The issue in this case is not analogous to a case:

(a) where plaintiff is forced by statute to display on his automobile license plate a patriotic ideological motto repugnant to a follower of the Jehovah's Witnesses faith, *Wooley* v. *Maynard*, 430 U. S. 705 (1977); or

(b) where the state attempts to prohibit the issuance of a professional license because of the applicant's beliefs, *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971); or,

(c) where First Amendment rights may be chilled by a governmental investigative and data gathering activity causing actual or threatened injury, *Laird* v. *Tatum*, 408 U. S. 1 (1972); or,

(d) where a person's right to the free exercise of his religion is conditioned on the surrender of his right to office, *McDaniel* v. *Paty*, 435 U. S. 618 (1978); or,

(e) where a religious sect is forced to send its children to a public school contrary to the sect's religious beliefs, *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); or,

(f) where students are being required to participate in a patriotic pledge contrary to their beliefs, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); or,

(g) where the wearing of armbands by students in a Vietnam protest could not be prohibited where it did not interfere with school activities or impinge upon the rights of others, *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969).

Plaintiff also cites *Russo* v. *Central School District No. 1*, 469 F. 2d 623 (2d Cir. 1972), *cert. denied*, 411 U. S. 932 (1973), as squarely considering the present issue, but it does not. The court held that a high school art teacher could not be dismissed for her silent refusal to participate in her school's daily flag ceremonies. She would only stand silently and respectfully at attention while the senior instructor led the program. Her job was not to teach patriotic matters to children but to teach art.

The court carefully indicated that through its holding it did not mean to limit the traditionally broad discretion that has always rested with local school authorities to prescribe curriculum.

The curriculum which plaintiff complains about is not spelled out in specific detail, but can be found in the Board of Education policy and the directives of plaintiff's principal and superiors. There is after all nothing innovative or unique in this phase of the curriculum. It is traditional. There was no misunderstanding about what was expected to be taught.

Plaintiff in seeking to conduct herself in accordance with her religious beliefs neglects to consider the impact on her students who are not members of her faith. Because of her religious beliefs, plaintiff would deprive her students of an elementary knowledge and appreciation of our national heritage. She considers it to be promoting idolatry, it was explained during oral argument, to teach, for instance, about President Lincoln and why we observe his birthday. However, it would apparently not offend her religious views to teach about some of our past leaders less proudly regarded. There would only be provided a distorted and unbalanced view fo our country's history. Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please. Plaintiff's right to her own religious views and practices remains unfetered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy. In this unsettled world, although we hope it will not come to pass, some of the students may be called upon in some way to defend and protect our democratic system and Constitutional rights, including plaintiff's religious freedom. That will demand a bit of patriotism.

There remains the plaintiff's claim that plaintiff's right to due proces was violated by her discharge. It is conceded that as an untenured teacher plaintiff had no property interest in the teaching position. It is plaintiff's claim that her right to freedom of religion is a liberty interest which can only be extinguished by due process. Due process, it is argued, required that plaintiff be afforded an adversary hearing prior to dismissal. The statement of this issue is likewise contorted. Plaintiff's religious freedom is not being extinguished. The Fourteenth Amendment does not create a protected interest, but if one is found to exist by reason of some independent source, the Fourteenth Amendment protects it. No state statute or other rule or policy creates a protected interest for an untenured teacher in those circumstances. There is no claim that plaintiff has suffered a stigma by reason of her discharge. She should not and she has not. *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Colaizzi* v. *Walker,* 542 F. 2d 969 (7th Cir. 1976), *cert. denied,* 430 U. S. 960 (1977).

We affirm the grant of summary judgment by the district court.

AFFIRMED.